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Supreme Court, U.S.
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No. 04-902

In The
Supreme Court Of The United States

JERRY MURPHY,
Petitioner

vs.

METROPOLITAN TRANSIT AUTHORITY,
Respondent

On Petition for a Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

This is a case of age and race discrimination in employment termination that has moved to the Supreme Court on issues of credibility of the litigants. There are fact issues unresolved relative to what constitutes a vanpool becoming active. The Respondent offers that a vanpool is assumed to be active with the submission of a certain document, the Group Information Report. (*R. 351*) The Petitioner insists that this is not the correct document to verify that a vanpool is active, that this is only a set-up document. The document, which does verify that a vanpool has become active, is the Financial Incentive Report, *R. 344*, and it was not returned completed and submitted. The correctness of the documents is significant because this particular document submission act is alleged to have caused confusion in relation to the operational status of a particular vanpool group, (Reliant/Creekridge). Additionally, the Petitioner suggests the termination was incorrect because it was based on pretextual reasons, and that the actual reason for termination was because of age and race bias. The Respondent has disputed the appropriateness of the charge because the litigants can be said to be members of the same classes. Even so, the Petitioner asserts that circumstances of unreasonable and malicious abuse legitimize the claim of discrimination when there is no other reason for such abuse. The Respondent has also held that it is protected from deformation claims because of its sovereign immunity as an agency of the state. It is clear, however, that the Petitioner's character has been diminished as illustrated by the words used by the District Court Judge when he stated: "he (*Murphy*) lied about the existence of a vanpool" (*pg. 3*). It is because of this type of characterization that the

Petitioner must defend his name and reputation. Termination of employment under implied circumstances of ethical abuse, (e.g., 'the appearance of impropriety', *R.412*), has ended his immediate income and has prevented future income in employment. It is impossible for the Petitioner to accept in a small closely knit working environment, *R. 338, lines 8-15*, (a staff of three vanpool representatives) with the Petitioner's office being directly across the hall from the Supervisor and Director, that such punitive, scathing, accusation of work ethic violations can be made without consideration of age and race bias. The Court is being asked to equally consider circumstantial evidence in its review of this case. The Court of Appeals reviewed the case 'assuming arguendo' that the Petitioner had established a prima facie case. The Respondent in its Brief in Opposition to the Petition for a Writ of Certiorari indicated that the 'Petitioner fails to identify any evidence in the record that "similarly situated" employees were treated more favorably.' (*Page 5*) The Petitioner disagrees and points to page 8, lines 19-23, Plaintiff's Response to Defendant's Motion for Summary Judgment, and page 2, lines 3-18, of the Reply Brief of the Appellant to the Court of Appeals. The Petitioner has correctly presented a prima facie case for the Court to address an issue of discrimination. The Lower Courts' decision should not be allowed to stand because it raises the bar of proof of discrimination to a level that is not attainable in any case.

REASONS FOR GRANTING THE WRIT

The issue in this case is whether a Summary Judgment decision was an appropriate forum when significant fact issues were not resolved. There is

continued assertion by the Respondent that the non-discriminatory reason for termination was: "Petitioner's employment was terminated because he presented paperwork to Metro for a vanpool that did not exist and stated that the nonexistent vanpool was a 'go'", (*page 5, Brief in Opposition*). It is significant that the Supreme Court review fact issues of this case because the Lower Courts' decision has allowed this Respondent (and I assume others) to by-pass the essence of Federal Rule of Civil Procedure 56 [c] on Summary Judgment by accepting that there is no issue of material fact in dispute.

The Petitioner insists there are fact issues in dispute:
1.) The Petitioner did not present paperwork of a vanpool that did not exist.
2.) The Petitioner did not state that a nonexistent vanpool was a 'go'.

The District Court Judge based his decision on the belief that the Respondent's presentation was correct and factual when it wrote: "Murphy wishes away the paper record that he produced…and the facts show that Murphy fabricated his work record." (*pg. 3*) Additionally, the District Court Judge writes: "…even if Metro had misinterpreted the representation about the vanpool, Murphy would still have no claim. It is irrelevant whether Metro's grounds for firing Murphy were erroneous as long as they were not transparent or false." (*pg. 3*) Likewise, the Respondent writes: "…the 'Petitioner's assertions miss the mark because "[t]he question is not whether an employer made an erroneous decision; it is whether the decision was made with discriminatory motives." *Mayberry v. Vought Aircraft Co., 55 F.3d 1086, 1091 (5th Cir. 1995)*

The Petitioner insists that there were two decisions made by the Metro managers:
1.) One was a decision to terminate based on paperwork submission prior to a van delivery.
2.) The second decision was to deny Murphy's updating of communications about the status of the van pool group. (*R. 549-551*)
If the first decision was an error on Metro management's part it still does not excuse the second decision; and it is the second that is the pretextual, discriminatory, cause for this lawsuit.

The Panel Judges wrote: "Management finally terminated Murphy after the dissolution of a van pool group that Murphy organized; Murphy failed to provide prompt notice of the dissolution to management purportedly causing cost and significant inconvenience." (*pg. 4-5*)

The Judges were misled on three points:
1.) The vanpool group had not dissolved because approval was given for the group to have extended time to come on line. (*R.080*)
2.) The pending status of the group was promptly reported and updated to management by Murphy. (*R.549-551*)
3.) The alleged dissolution did not cause cost and significant inconvenience, because the vans are paid for at the end of the month after verifying 12 rides per rider. (*R. 838*) Since this particular van never began operating it never generated cost.

It is the misunderstanding of the use of the word 'cost' not the word 'go' that is the difference in what is thought to be a problem in this case. Ms. Shepard, Incentive Coordinator, did not think that this vanpool group was already operational with Mr. Murphy using

the word 'go' because she prepared an October Financial Incentive Report not a September Financial Incentive Report. The 'cost' related to a van being operational is based on to two types of monthly documents: (1) the Financial Incentive Report used at the beginning of the month to verify that riders intend to ride. This document is due back to Ms. Shepard by the 3rd working day of the month in which the van is active; (2) the Ridership Log document is used at the end of the month to verify that the riders have completed 12 rides before getting a $35 credit towards the 'cost' of riding in the van. This document is due back to Ms. Shepard by the third working day of the month following the ride month.
Obviously, Ms. Shepard would not imply that she felt a van was generating 'cost' in a month that she had not prepared a Financial Incentive Report under which it must operate in order to get 'cost' credits.

Reeves provides: "...a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the tier of fact to conclude that the employer unlawfully discriminated." *Reeves at 530 U.S. at 148, 120 S. Ct. at 2109* Additionally, there is precedence set in *Reeves v. Sanderson Plumbing Products* that summary judgments should not be based on evidence that comes from interested witnesses. In this case Mr. David McMaster, Director Customer Service and Sales, makes the allegations against Mr. Murphy in his October 8, 2002 memo (*R. 412*). This is the only evidence submitted by the Respondent to support its action of termination. Mr. McMaster would be an interested witness, as such his assertions should not be the basis of a summary judgment decision. Removing Mr. McMaster's assertion that Murphy did not inform his supervisor 'that the vanpool had not

actually begun operation' leaves nothing on which to base the termination. The Petitioner has provided proof that he did inform his supervisor that the vanpool had not begun operations, *R. 549 & 550.* The Respondent, however, asserts that the Petitioner is responsible for status reports about the van being active which went to upper management. This would only be practical if Mr. Murphy was in the flow of the upper management reports with the misinformation. The flow of these reports did not come to Mr. Murphy's desk so he cannot be held responsible for what was in them. Mr. Murphy did provide his input of his activities in the staff's Monthly Report of van deliveries, *R. 413-414.* Murphy did not report the disputed van as delivered, only that it was forming. This removes any basis for Mr. Murphy to be responsible for any incorrect status reports going to upper management on this vanpool group.

The Defendant writes in his Surreply to Plaintiff's Response to Motion for Summary Judgment, at page 3, footnote #4: "Plaintiff does assert that his communications to Ms. Shepard were proper because there was an 'active vanpool' in the sense that there were still people at Reliant Resources interested in forming a van on September 26, 2002. That assertion misses the point, however, because Ms. Shepard took the aforementioned action in reliance on Plaintiffs representation to her that the van was a 'go'."

The unresolved issue is whether any misunderstood statement can imply that a van is operational when the Petitioner is insisting the only instrument that correctly indicates that a van is operational is a completely signed Financial Incentive Report, which must be returned to Ms. Shepard each month before the van begins operation.

As the Respondent continues to assert that the Petitioner 'presented paperwork to Metro for a van that did not exist' (*pg. 5*), he invokes a fact issue under Rule 56 where: '[t]he moving party bears the initial burden of "informing the Court of the basis of its motion," and identifying those portions of the record "which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).*' The Respondent has not presented any evidence that the vanpool group did not exist. They have only presented a memo document from Mr. McMaster dated 10-8-02 (*R. 412*). This document only asserts that Murphy submitted the paperwork, and then (incorrectly asserts) Murphy reported the group was "a go" and 'informed his supervisor and manager of the delivery'. There is nothing in this document about a van that did not exist. The Petitioner, on the other hand, did present evidence that the vanpool group did exist, *R. 067 or 553.* Since the document submission, and what the submission act is purported to represent, is a material fact issue, it should not have been resolved in a summary judgment forum. 'A fact is "material" if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).*

A jury question is created in this case because there is no evidence supporting a cause for termination that was found in the record and presented by the Respondent. In the absence of any provable evidence presented as the reason for termination, the Petitioner has asserted that the issues raised for termination are pretextual and false; the actual reasons for termination are due to age and race discrimination. The Petitioner has presented more than nine pretextual reasons of

age and race discrimination. (*pages 6-11, Petition for Writ of Certiorari*)

To these charges the Respondent has responded that the Petitioner is of the same classes as the Respondent and therefore the charges are not appropriate. Additionally, the Respondent has indicated that termination was recommended by the same person that hired him two years earlier. To this list the District Court Judge added that the Petitioner worked for an employer that had a 60% African American workforce (*pg. 3*).

Addressing the last point first, the Petitioner provided in his appeals' brief that he was an exempt employee in a department comprised of about 10% African Americans as exempt employees. Although the Petitioner, Mr. Jerry Murphy, was hired and terminated by Mr. David McMaster, a white male age 44 at the time of termination, the Petitioner did not work directly for Mr. McMaster. Mr. McMaster relied on his manager, Ms. Evangeline Soto-Chairez (age 59, Hispanic) and his supervisor, Mr. William Pitts (age 43, African American) to advise him of activities of the van rep staff. Mr. McMaster had a total staff of about 50 hourly and salaried employees. Mr. Murphy (age 59, African American) was a part of the salaried staff and reported directly to Mr. Pitts. Mr. Pitts demonstrated age and race bias toward Mr. Murphy in his assignment of accounts that had corporate subsidies. This caused a difference in van production credits when compared to the different van rep staff members. Van production is the only alleged deficiency of Murphy's performance evaluation.

CONCLUSION

The Court of Appeals provided the reason for termination as being: "Murphy failed to provide

prompt notice of the dissolution to management." (*pg. 5*) This assertion has been proven to be false from the evidence provided. The Petitioner did report the status of the developing vanpool group in a timely fashion. The evidence provided was written communications, *R. 549-551 & R. 068-070.* The Respondent's response to these written e-mail evidences was: "That argument is nonsense. It shows nothing, other than Mr. Pitts was mistaken or that he had forgotten about the e-mail messages." (*pg., 2, footnote #3, Defendant's Surreply to Plaintiff's Response to Defendant's Motion for Summary Judgment; docket item # 31*) However, the Petitioner also provides Mr. Pitts' e-mail of 9-12-02 where he wrote that a condition of Murphy's Performance Improvement Plan was to keep him informed of his activities at all times. (*R. 353*) The argument then is not 'nonsense' because it verifies Pitts' reason for termination to be pretextual and discriminatory for his age and race bias.

The District Court Judge indicated: "...he lied about the existence of a vanpool. Metro fired him for this." (*pg. 3*) The Petitioner has shown with written evidence that the vanpool group was still interested in vanpooling as late as October 13, 2002. (*R. 067 or 553*), therefore the vanpool group did exist. It is because the vanpool group was given until October 16th to be completely on line by the RideShare Manager, Ms. Evangeline Soto-Chairez, that the termination is pretextual for age and race bias. (R. 553 & R. 080)

Mr. McMaster communicated with the Texas Workforce Commission on 11-15-02 indicating that Murphy had reported 'that the van was in operation... the reporting of it as an active van when it was never

an active van' was the reason for termination. (*R. 907*) Mr. McMaster continued to report this inaccurate information even though the evidence shows he knew differently according to e-mails to him from Pitts on 10-14-02 (*R. 549*) and on 10-15-02 (*R. 855*) This evidence confirms that Mr. McMaster allowed the termination for the pretextual reasons of age and race bias.

The Respondent has indicated that this case has not established prima facie. The Petitioner has previously provided that he is (1) a member of protected classes by being African American and age 59 (when terminated), (2) he is qualified for sales and management level positions because he has more than 20 years experience in both areas, (3) he has suffered an adverse employment action by termination, and (4) there are similar situated employees, outside of his protected classes, who were treated more favorably than he. Those employees are Troy Macom (age less than 40, white), John Nunez (age 55, Hispanic), and Beverly Elam-Homer (age 51, white). These persons were provided preferential assignments of accounts that had corporate subsidies that allowed for establishing easier vanpool accounts; additionally they were not terminated when their vans did not come on line as scheduled. To be able to name specific accounts the Petitioner would have to review the documents that the District Court denied in the Plaintiff's Motion to Compel (*docket item # 22*).

The summary judgment decision in this case was not based on factual information, because of this the Supreme Court should reverse the Lower Courts.

Respectfully submitted,

Jerry Murphy

Jerry Murphy, Pro Se Petitioner; 2/8/05